IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

JAMES MORRISON,
Plaintiff

v. Civil Action No. 01-C-145

CSX TRANSPORTATION, INC.,
Defendant

**ORDER DENYING MOTION FOR NEW TRIAL**

There is currently before the Court a Motion for New Trial filed by the plaintiff in regard to the above captioned matter.

This Court has reviewed the Motion together with memoranda of law in support of and in opposition to the Motion and finds that no error has occurred requiring the granting of the Motion, accordingly the Motion for a New Trial pursuant to 59(a) WVRCP is hereby **DENIED**, to all of which the Plaintiff's objection is hereby preserved.

It is so **ORDERED.**

A certified copy of this Order shall be sent to the plaintiffs in care of Gary F. Easom, Esquire, PEIRCE, RAIMOND & COULTER P.C., 2500 Gulf Tower, 707 Grant Street, Pittsburgh, PA 15219-1912 and to the defendants in care of James W. Turner, Esquire, HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, LLP, Post Office Box 2185, Huntington, WV 25722-2185.

**APPENDIX A-1**

Enter this 27th day of January, 2004.

/ Arthur M. Recht
ARTHUR M. RECHT, JUDGE

**A copy, Teste:**
**/Brenda L. Miller**
**Circuit Clerk**

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th of June, 2004, the following order was made and entered:

James F. Morrison, Plaintiff Below,
Petitioner

vs.) No. 040887

CSX Transportation, Inc., Defendant
Below, Respondent

On a former day, to-wit, May 13, 2004, came the petitioner, James F. Morrison, by Mark T. Coulter and Sharon A. Gould, Peirce, Raimond and Coulter, his attorney, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Ohio County, rendered on the 15th day of January, 2004, with the record accompanying the petition.

Thereafter, on the 2nd day of June, 2004, came the respondent, CSX Transportation, Inc., by James W. Turner, William H. Harkins, Jr. and Alexander C. Ward, Huddleston, Bolen, Beatty, Porter & Copen, LLP, its attorneys and presented to the Court its written response in opposition thereto.

Upon Consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice McGraw would grant.

A True Copy

Attest: s/Rory L. Perry, II
Clerk, Supreme Court of Appeals

**APPENDIX B**

**§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.
(Apr. 22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404.)

**APPENDIX C-2**

## §§ 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.
(Apr. 22, 1908, ch 149, § 3, 35 Stat. 66.)

## APPENDIX D

Deposition Alan Ducatman, M.D. 12/4/03
Deposition at page 43, line 8 to page 44, line 10.

A. As a physician, I'm very comfortable with the concept of things causing other things in whole, because the human body and what we know about medicine rarely works that way.

First of all, almost any disease is an interaction between our genes and the environment. And who we are is also important. And that relates to things that we don't control.

Secondly, he doesn't have just one risk factor, he has some others, although not a lot. His borderline diabetes is in the literature of uncertain amount, but still a potential cause of earlier cognitive deficits. The fact that he has been a smoker, albeit not a heavy one, is another cause of an uncertain amount of cognitive deficits.

He has been, I'm trying to remember, has he been treated for hypertension? I believe so. That's another thing that can go with cognitive deficits. And that's fairly common for all of us to have more than one risk factor for diseases that we get and diseases that we don't get. So I'm very hesitant ever to say that something is the cause.

But to take something like repeated intoxication and say it's not an important cause would be a very wrong thing to do. And it is a very important contributing cause, simply not a sole cause, because there are very few sole causes.

Deposition at page 45, lines 14-15

A. I feel that the solvent exposure is the most significant of his risk factors.

Deposition at page 45, lines 4-7

A. There is no science that permits us to do that for this. There aren't even good models, That doesn't preclude us from winging an unfounded opinion, but there is no science behind that opinion.

**APPENDIX E - 2**

Trial Testimony – Dr. Marc Haut

Page 49, lines 3-7

A. Yes, it's with a reasonable degree of certainty within my profession that he has changes with his cognitive functioning; and that he has permanent changes to his brain as a result of this exposure to solvents.

Page 71, lines 3-18

Q. Would you refer to the opinion or defer to the opinion of Doctor Ducatman with respect to the effect of other causative factors – and I believe Mr. Easom said a couple of them to you: Hypertension, borderline diabetes, high cholesterol, a smoking history and sleep problems?

Would you defer to Doctor Ducatman's opinion regarding those medical things as being causative factors in any of Mr. Morrison's problems?

A. No, I would not.

Q. You would differ from Doctor Ducatman?

A. No, I offer opinion as to whether factors such as those influence a person's cognitive functioning every day when I see patients. Most of the patients I see have complex medical histories that I have to help make those determinations on.

Page 246, lines 11-12

Q. What were your findings with respect to that?

A. On my examination that included his mini-mental status exam that, far more importantly, the 45 minutes or so that we just were talking face to face about his problems, my findings were that there were none. He had a normal neurologic examination with regard to memory and concentration.

Trial Testimony – Dr. James Albers

Page 248, lines 2-3

A. ...

Also, what he was describing was normal memory variation. This is how our memory works as we get older. It is normal to be able to remember things from the past better than currently.

Page 251, line 18 – page 252, line 2

Q. Doctor, do you have an opinion to a reasonable degree of medical certainty or probability whether Mr. Morrison has any neurologic problem caused or contributed to by the exposure to organic solvents that he alleged?

A. Yes. It's my opinion that I cannot attribute any of the complaints or symptoms or findings that he has to prior occupational exposure to solvents of any type used in his work.

Page 295, lines 19-20

A. ...percent. The problems are very real, but they're related to anxiety. They're not related to solvents.

**APPENDIX G**

Trial Testimony – Dr. Stanley Berent

Page 336, lines 3-5

Q. What is your opinion?

A. That he's functioning essentially normally from a cognitive neurophysological viewpoint.

Page 336 lines 19-20

Q. What is your opinion?

A. That the results are not consistent with damage from exposure to toxicants.

**APPENDIX H**

Charge Conference - Trial Transcript pages 463-465

THE COURT: We're making the changes, and the only major change that you don't have in front of you in the final draft is the change that we made on the bottom of Page 10 in Paragraph 1. And that's, of course, a CSX contention: But the plaintiff was not exposed to excessive levels of solvents sufficient to cause injury.

All the other changes are syntax, and you have on Draft 3.

Is there any on behalf of plaintiffs as far as the charge, any objection?

MR. EASOM: Yes, Your Honor. I'll try to be as brief as possible.

THE COURT: Okay.

MR. EASOM: With respect to, I believe, Page 12 – we're not sure it is still Page 12.

THE COURT: Okay

MR. EASOM: Yes, sir, the paragraph beginning with the proximate cause, we feel that, under FELA, that the issue of proximate cause is a misnomer and that the issue of causation is adequately covered by the other aspects of the charge consistent with the law or the statute in the sense that it's caused in whole or in part, even in the slightest. And that non-FELA law concerning proximate cause is inapplicable to these types of cases.

THE COURT: All right. I think that, if you take the instruction as a whole with, in essence, both paragraphs, that that is an appropriate definition of proximate cause even under the Federal Employer Liability Act. So the objection is noted, overruled and certainly preserved for the record.

Anything else?

MR. EASOM: Yes, Your Honor. With regard to Page 22, the part of the charge that deals with the divisibility of damages.

THE COURT: All right,

MR. EASOM: Beginning with, "Should you determine if the plaintiff's condition is due in part" --

THE COURT: Right.

MR. EASOM: -- "no matter how small."

THE COURT: Right.

MR. EASOM: And it talks about calculate the proportion of percentage. It was not caused by the defendant's negligence. We would move to exclude that from the charge on the grounds there's been no evidence that – from anyone, that that, No. 1, is even possible; and, No. 2, that there's been any quantification. And the jury certainly doesn't have the ability from this evidence to make such a determination based upon the evidence.

THE COURT: You just want it removed completely?

MR. EASOM: Yes, sir.

THE COURT: What's the – what does the defendant want? I think it's appropriate. But, if you both agree, I'll knock it out.

MR. TURNER: We think it's appropriate.

THE COURT: All right. I'll keep it in.

And your objection certainly is noted and preserved. That's for purposes of the record. It's the first – second full paragraph on Page 22.